SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-397

BRAND PLASTICS COMPANY, STANDARD OIL COMPANY (INDIANA), and AMOCO CHEMICALS CORPORATION,
Petitioners,

vs.

THE DOW CHEMICAL COMPANY,
Respondent.

Petitioners' Reply Brief in Support of Petition for Certiorari.

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Respondent would have this Court believe that the three Questions Presented (Petn. p. 2) are contrived and that the only real issue is an evidentiary disagreement between the District Court and the Court of Appeals. Such is not the case. The facts underlying the Questions Presented are undisputed.

The Withheld Art.

As set forth in our Petition (pp. 9-10) Dow failed to disclose to the Patent Office prior art known to it which the District Court held to anticipate the patent in suit. The Court of Appeals affirmed this holding of anticipation. These matters are undisputed.

We submit that under these circumstances the statement of the Court of Appeals relied upon by Respondent that: "nothing of significance was concealed from

the Patent Office" can have but one meaning which is that an applicant is not required to advise the Patent Office of anticipating prior art. Accordingly, Questions 1 and 2 are squarely presented.

Dow's Conduct Before the Patent Office.

As further described in our Petition (pp. 10-11), the Trial Court found that Dow deliberately and falsely represented to the Patent Office the results accomplished by the process which it sought to patent and also that Dow intentionally misled the Patent Office as to the nature of its process in order to obtain its patent. The Court of Appeals did not question the correctness of these findings nor suggest that they lacked support in the record. The Court of Appeals stated only that no "palpable fraud" had been committed and that:

> ". . . on the whole, the conduct of it (Dow) and its attorneys was essentially fair."

Under the circumstances, this conclusion of the Court of Appeals can mean only that there is no obligation on the part of an applicant to refrain from making these types of misrepresentations to the Patent Office. Accordingly, Question 3 is squarely presented.

The Proffered Testimony.

In furtherance of its contention that the instant case somehow is no more than an evidentiary disagreement between the lower courts, Respondents refer to the proffered testimony of one Sheffer, a former patent examiner which Respondent contends "contradicted the findings of the District Court." (Resp. Br. p. 2). But the opinion of the Court of Appeals nowhere mentions this testimony. Moreover, a cursory examination

to the Sheffer affidavit attached to Respondent's Brief demonstrates the specious nature of this contention. The affidavit does not suggest that Dow did not conceal prior art nor that such art anticipates the patent in suit. Moreover, the affidavit makes no reference whatever to the false representations made to the Patent Office by Dow. Finally, the affidavit specifically states that Sheffer did not personally pass on the question of patentability of the claims of the Dow application (para. 25) and that Sheffer did not even recall the application (para. 26).

Conclusion.

In opposing our Petition, Respondent does not question the importance of the Questions Presented. Instead, Respondent argues that such Questions are not present and that the case involves merely evidentiary matters. We submit that the undisputed facts squarely present the Questions and that Respondent's opposition to the Petition is without merit.

Respectfully submitted,

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